IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 503 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SALIMKHAN MAHMADKHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 503 of 1999

MR DEEPAK M SHAH for Appellant No.

THROUGH JAIL for Appellant No.

Ms.Hansa Punani, learned A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 03/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

#. The present appellant-original accused has been charged with the offences punishable under sections 8(c),20(b)(II) and Section 21 of the Narcotic Drugs and Psychotropic Substances Act (N.D.P.S. Act for short) for which the complaint has been lodged by the complainant before the Ahmedabad Railway Police Station on 07.05.1998 and same has been registered as Ahmedabad Railway Police Station C.R.No.II 3237 of 1998 and accused was arrested and taken into judicial custody. At the end of the investigation, chargesheet was submitted and it has been numbered as Sessions Case No.211 of 1998 and same has been sent to the court of learned Additional Sessions Judge, Court No.15 and charge was framed against appellant-accused. As the accused pleaded not guilty and prayed for trial, to prove the guilt of the appellant-accused, prosecution led oral evidence of various witnesses and also produced documentary evidence on record. On submission of closing pursis, learned Additional Sessions Judge recorded the further statement of accused under Section 313 of the Criminal Procedure Code and at the end of the arguments, he convicted the accused for rigorous imprisonment of ten years and also fine of Rupees one lakh and in default further rigorous imprisonment of one year for the offence punishable under Section 20(b)(ii) and 21 of the N.D.P.S.Act in each offence. Being aggrieved and dissatisfied with the judgment delivered by the learned Additional Sessions Judge, Court No.15, Ahmedabad city on 30.04.1999, the appellant has sent the appeal from the Central Jail, Ahmedabad through Superintendent, Central Jail, Ahmedabad on 25.05.1999 and the same has been admitted and learned counsel Mr.D.M.Shah has been appointed by the legal aid to assist the appellant.

#. The brief facts of the case are as under :

That on 7.5.98 when Shri B.A.Tiwari P.I.Railway Police Station, Ahmedabad was on duty, at about 20.10 p.m., he received secret information from Police Constable Mahipat Kanubhai that a person wearing black trousers, dark brown colour checked shirt was selling narcotic substance near the steps leading to the computer building which is located in the precinct of the Ahmedabad Railway Station. The same was reduced into writing by him in the station diary and also informed his Superintending Officer and he immediately called his staff and also made arrangement for panch witnesses and

also person for weighing the substance, if any found. Thereafter PI started preparation for a raid and he collected a plastic bag, sealing wax, seal, pieces of cloth, string and a Tobacco tin and such other equipments were collected for the purpose of raid. The said information was reduced into writing and an entry bearing entry no.33/98 was made in the station diary and panchas were given information and on their showing willingness to act as panchas, preliminary panchanama to that effect was carried out at the Ahmedabad Railway Police Station itself between 20.30 p.m. and 20.45 p.m. Thereafter, he went along with all the above referred persons towards the computer building and it was found that a person matching the description provided in the information was found to be standing on the steps leading to the computer building and he was detained by PI Tiwari and after making preliminary enquiries, he was informed that he was required to be searched and name of the accused was also asked. He gave his name as Salimkhan Ahmedkhan Shaikh and claimed to be a resident of Bhopal. Thereafter, Shri Tiwari has sought the willingness of the accused regarding his valuable right of being searched in presence of a Gazetted Officer or a Magistrate. The accused has denied the same and permitted his search to be carried out by them. Subsequently the accused was searched. During the search, from the left pocket of his shirt, a packet covered with plastic paper was found. On preliminary investigation, it was found that the said packet contained a powdery substance and since the packet was found in an unopened condition, one side of the said packet was torn open and it was found that within the said packet, a powdery substance was found enclosed in another plastic bag and powdery substance was found to be a narcotic substance popularly known as brown sugar and same has been weighed and it was found to be weighing five grams and same has been sealed in the presence of panchas and others with wax and on the seal, name of P.I., Ahmedabad Railway Police Station was written. The market value of the brown sugar was assessed at Rs.50,000/-. During the course of further search, from the right shirt pocket, a blue colour substance wrapped in thin butter paper was found and on preliminary investigation and smell, the same came to be primarily identified as charas and weighing the same, it was found to be weighing 10 grams. Same was also properly sealed as required. During the further search, currency note of Rs.100/- was found in his right shirt pocket and Rs.18,650/- were recovered from the attache which were recovered and seized by preparing detailed panchanama on the spot. As no satisfactory explanation could be provided by the accused, complaint was prepared against

the accused, and the same was sent to P.S.O, Ahmedabad Railway Police Station along with forwarding letter, panchanama, muddammal and accused for registering the offence and offence was registered against the accused as II CR 3237/98 with the Ahmedabad Railway Police Station and further investigation was handed over to Shri V.R.Patil, PSI. He sent the muddammal to the FSL for analysis and on receipt of this FSL report and on completion of the investigation, chargesheet came to be filed against the appellant-accused in the court of Principal Judge, City Sessions Judge, Ahmedabad.

#. As the appellant-accused appeared before the learned Additional Sessions Judge on 11.9.98, charge was framed at exh. 1 against the present accused and he has pleaded not guilty and claimed to be tried and therefore prosecution has led oral as well as documentary evidence and on submission of closing pursis, further statement of the accused was recorded and thereafter, the present petitioner was convicted by the concerned Judge on 30.04.1999.

#. We have heard the learned counsel for the appellant Mr.D.M.Shah and Ms.Hansa Punani, learned A.P.P. on behalf of the State. Only point which requires consideration of this Court is that Section 50 of the N.D.P.S.Act is a mandatory one as held by the Apex Court and same has not been followed by the prosecution at the time of search and seizure proceedings and therefore it being mandatory in nature, this appeal is required to be allowed and judgment and order passed by the learned Additional Sessions Judge is required to be quashed and set aside. For that, he has taken us through the oral evidence of PI Tiwari P.W.1 Exh.7, more particularly cross-examination of Shri Tiwari and argued that it has been admitted by Shri Tiwari that it is true that at the time of search and seizure of the accused, he has not informed the accused in writing regarding his right to search and seizure before the Gazetted Officer/Magistrate. Showing the same, it has been vehemently argued by the learned counsel for the appellant that it indicates that he has not followed the provisions of Section 50 of N.D.P.S.Act. He has also tried to distinguish between the two that he has not informed the accused regarding his rights under Section 50 in writing to the appellant which is clear breach of Section 50. For that, he has also taken us through the relevant para of the judgment more particularly para 21 and argued that same has been discussed by the court below that there is a clear breach to that effect and therefore the appellant is required to be acquitted. It

is further argued that the present appellant is a permanent resident of Bhopal and he came in Ahmedabad fo the purpose of purchasing the ready-made garments but as the shop-keeper has informed him that it is not the proper time to purchase ready-made garments, he was returning to Bhopal and for that purpose he was sitting on the platform and waiting for train. It has also been assured that when he was counting the currency notes, at that time some Police officer came there and asked bribe of Rs.10,000/- and as he has denied the same, he has been falsely implicated in the offence in question. It has also been argued by Mr.Shah that prosecution failed to establish that the alleged muddammal has been recovered from the appellant-accused and same has remained in tact in the police station till it reached to the F.S.L. It has also been argued that the prosecution has also failed to establish that the muddammal recovered from the accused has reached the F.S.L. and is analysed by the F.S.L. In these circumstances, the F.S.L. report showing that the muddamal in question analysed is a narcotic substance cannot be said to be the same muddammal alleged to have been recovered from the present appellant.

#. Learned A.P.P. Ms.Punani has vehemently argued that it is a well reasoned judgment which has been delivered by the Court below after considering all aspects of the matter and evidence on record. She has also taken us through the various oral evidence including the evidence of P.I.Shri Tiwari, panchas and other persons who were in the team along with P.I.Tiwari. She has also taken us through other evidence on record to satisfy the conscience of the court regarding search and seizure and also for the purpose of proving that the muddammal in question which has been seized from the appellant-accused has been sent to the F.S.L. in sealed condition and same has been analysed by the F.S.L. and as per the opinion of the F.S.L., it has been found to be a contraband article. Therefore, it cannot be said that the muddammal analysed by the F.S.L. is not the muddammal recovered from the accused. It has also been argued that in the cross-examination, P.I.Tiwari has admitted that he has not informed the accused in writing regarding his right to search and seizure before Gazetted Officer and/or Magistrate. She has also taken us through para 20 of the judgment and argued that same has been properly dealt with by the lower Court and is a well reasoned and convincing judgment and does not require any interference. Therefore, she has requested for dismissal of the appeal.

#. We have gone through the complaint exh.12 wherein it has been categorically mentioned by the complainant that before the search and seizure of the concerned person, he has informed the accused regarding his right to be searched and seized before Gazetted Officer and/or Magistrate and in turn he has denied the same and, therefore, search and seizure has been done by them. Same has been also reflected from panchnama exh.13 and oral evidence of P.W.1 complainant P.I.Tiwari and nothing contrary has come out from his cross-examination. Over and above the prosecution gets support from the oral evidence of P.W.2 exh.19 i.e. Kalubhai Himatbhai, Police Constable Ahmedabad Railway Police Station who was also one of the members of the raiding party and also gets support from another member of the raiding party, police constable, P.W.3 Mahipatsinhji Kanubhai Exh.20 and from the panch of search and seizure, P.W.4 Sunildatta Pitambardatt Sharma Exh.22. So in short the prosecution gets support from P.W.1,2 & 3 who were members of the raiding party and also gets support from P.W.4 who was panch witness and therefore it has been established beyond reasonable doubt that before search and seizure of the accused, P.I., Shri Tiwari has strictly followed the provisions of Sec.50 of the NDPS Act. When a question was put to him in his cross-examination as to whether he has informed the accused in writing, it was replied that he has not informed the accused in writing. As discussed above, since it has been established beyond reasonable doubt that before search and seizure, Shri Tiwari has strictly followed the provisions of Sec.50, we are unable to accept the argument of the learned counsel for the appellant that there is breach of provisions of Sec.50 of the NDPS Act.

#. So far as the other point which has been raised by the learned counsel for the appellant is concerned, we have gone through the evidence on record which has been shown to us by the learned counsel for the respective parties which clearly shows that it is trustworthy and though there are minor contradictions, it does not lead to the extent that we should think that it is not believable. Keeping in mind this aspect of the matter, we are of the opinion that there is no evidence on record which lead us to believe that the accused has been falsely involved in the serious offence as prosecution has demanded huge amount and which he was not able to pay. The facts are otherwise. Even Rs.18,650/- has also been recovered during the search and seizure and same has been reflected in the panchanama and other proceedings. As far as the muddammal in question is concerned, it has been established beyond reasonable doubt by the

prosecution that the muddammal which has been seized from the accused has been handed over to P.S.O. and it has remained in tact till it reached the FSL, which also reflects from the receipt of the FSL and from the evidence to that effect that the FSL has received the muddammal in seal condition. Therefore, the prosecution has been able to prove beyond reasonable doubt that the muddammal which has been seized has remained intact and it has reached the FSL in the same condition and there was no possibility of tampering with the same and as opined by the FSL expert, the muddammal is contraband substance. In these circumstances, during the whole search and seizure, the prosecution has followed all required procedure and there is no breach to that effect. In these circumstances, this appeal deserves to be dismissed and is accordingly dismissed.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

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